

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
W.R. Grace & Co., <u>et al.</u> ,)	Case No. 01-01139 (KJC)
)	(Jointly Administered)
)	
Debtors.)	Re: D.I. 31718, 31794, 31849

**REPLY OF ZAI CLASS COUNSEL IN SUPPORT OF
MOTION FOR A COMMON FUND FEE AWARD AND
IN RESPONSE TO LUKINS & ANNIS' "COUNTER MOTION"**

ZAI Class Counsel, by and through their undersigned counsel, having filed their *Motion for a Common Fund Fee Award* (the "Fee Motion") (Docket No. 31718), hereby submit this reply in support of their Motion and in response to the "Counter Motion" filed by Lukins & Annis (Notice at D.I. 31846, Partial Joinder at 31794).

There is No Opposition to Class Counsels' Common Fund Fee Request

ZAI Class Counsel represented in their motion that their request for a common fund fee award of 25% of the first two ZAI settlement payments would be unopposed by all interested constituencies (Fee Motion at 1). That has proven true. No party has filed any objection to that request, or to ZAI Class Counsel's amended request for reimbursement of costs in the amount of \$225,116.17 (D.I. 31789). Accordingly, ZAI Class Counsel respectfully request that the Court enter an Order for a common fund fee award of 25% of the first two of the ZAI settlement payments and reimbursement of ZAI Class Counsel's costs of \$225,116.17 from the ZAI Trust.

Lukins & Annis' Cross Motion Seeks Only to Share in the Fee

Lukins & Annis, on behalf of itself, has filed a "counter motion" in response to ZAI Class Counsels' common fund fee request. Lukins & Annis is a law firm that voluntarily withdrew from all ZAI litigation nearly a decade ago shortly following Class Counsel Darrell Scott's

departure from that firm. Lukins & Annis supports the Court's approval of a 25% common fund award as requested by ZAI Class Counsel, but asks that disbursement of the award be stayed pending resolution of a fee claim Lukins & Annis intends to make on that award. Lukins & Annis also seeks reimbursement of certain litigation costs to be paid from the ZAI Trust, which are in dispute.

The court in a class action settlement has an independent duty to the class and the public to ensure that attorneys' fees are reasonable and that fees awarded are divided fairly among plaintiffs' counsel. *Drazin v. Horizon Blue Cross Blue Shield of N.J., Inc.*, 528 Fed. App'x. 211, 214 (3rd Cir. 2013), citing *In re High Sulphur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008). In exercising its responsibility, courts ideally leave the allocation of a common fund fee award to be handled by agreement among class counsel. *In re Copley Pharm., Inc.*, 50 F. Supp. 2d 1141, 1148 (1999); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 357 (N.D. Ga. 1993) (citing Newberg, *Attorney Fee Awards* § 2.16 (1986)); *see also Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992). "The rationale for this policy is both logical and practical. Class Counsel are better able to decide the weight and merit of each other's contributions." *In re Copley Pharm., Inc.*, 50 F. Supp. 2d at 1148; *see also Turner v. Murphy Oil USA, Inc.*, 582 F. Supp. 2d 797 (E.D. La. 2008).

Fortunately, as set forth in ZAI Class Counsel's motion, ZAI Class Counsel have resolved the primary issues regarding fee allocation by an agreement among ZAI Class Counsel and with two associated firms that remained involved in ZAI litigation throughout this bankruptcy (*see* Fee Motion at 28, n. 30). As also recounted in that motion, Class Counsel were unfortunately unable to reach an agreement with one remaining law firm, Lukins & Annis, which claims entitlement to fees and costs. (*Id.*). The sole unresolved issue, therefore, is whether

Lukins & Annis is entitled to any fees or costs and, if so, in what amount. Fed. R. Civ. P. 23(h) governs the award of fees in a class action. Subsection (1) states: “A claim for an award must be made by motion under Rule 54(d)(2).” Lukins & Annis has not yet filed a motion for award of fees. It describes the remaining issue, nonetheless, as a determination of the value to the class of the legal work Lukin & Annis performed and whether those specific services benefitted the fund. (Partial Joinder, D.I. 31794 at 6).

Class Counsel view resolution of Lukins & Annis’ fee claim as a straightforward matter, capable of expeditious resolution. To avoid unnecessary Court involvement in reviewing time records and facts underlying the history of various ZAI litigation matters, Class Counsel propose that the Court appoint retired bankruptcy judge Judith K. Fitzgerald, who previously presided over this case, as an Expert pursuant to Fed. R. Evid. 706, to issue a report and recommendation to the Court regarding Lukins & Annis’ forthcoming motion. Class Counsel attach a proposed Order providing for Judge Fitzgerald’s appointment, a streamlined document exchange, and briefing schedule. Class Counsel understand that Judge Fitzgerald was contacted by Lukins & Annis’ counsel and has agreed to serve if the Court is agreeable. Because of the length of time that Class Counsel have been in discussions with Lukins & Annis, Class Counsel do not believe that mediation would be helpful, and do not agree to private arbitration.

The funds from which attorney fees and litigation costs are to be paid are currently held in trust by the ZAI Trustee. No provision is necessary, therefore, to preserve funds to pay fees or costs that Lukins & Annis may be awarded. Class Counsel have no objection to an Order staying disbursement of common fund fees pending a ruling by this Court.

According, Class Counsel respectfully request that the Court appoint Honorable Judith K. Fitzgerald as a Rule 706 Expert pursuant to the attached Order.

Date: March 26, 2014
Wilmington, DE

SULLIVAN · HAZELTINE · ALLINSON LLC

/s/ William D. Sullivan

William D. Sullivan (No. 2820)
William A. Hazeltine (No. 3294)
901 North Market Street, Suite 1300
Wilmington, DE 19801
Tel: (302) 428-8191
Fax: (302) 428-8195

-- and --

THE SCOTT LAW GROUP, P.S.
Darrell W. Scott
926 W. Sprague Avenue
Chronicle Building, Suite 680
Spokane, Washington 99201
Telephone: (509) 455-3966

-- and --

RICHARDSON, PATRICK,
WESTBROOK & BRICKMAN, LLC
Edward J. Westbrook
1037 Chuck Dawley Blvd., Bldg. A
Mt. Pleasant, South Carolina 29464
Telephone: (843) 727-6513

-- and --

LIEFF, CABRASER, HEIMANN &
BERNSTEIN, L.L.P.
Elizabeth Cabraser
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone: (415) 956-1000

Counsel for ZAI Claimants